IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION EIGHT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALFONSO MARTINDALE,

Defendant and Appellant.

B213695

Superior Court
No. LA056510

Appeal from the Superior Court of Los Angeles County

Honorable Susan Speer, Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal is from a final judgment of conviction after a jury trial and is authorized under section 1237, subdivision (a).[1] Judgment was entered on December 15, 2008. (CT 119.) A notice of appeal was timely filed on December 24, 2008. (CT 123.)

[1/] Generic statutory references are to the Penal Code.

STATEMENT OF THE CASE

Appellant Alfonso Martindale was charged by information with two felony counts of maliciously informing about a false bomb (§ 148.1, subd. (c)), and two felony counts of making a criminal threat (§ 422). (CT 31-33.) Prior to trial, the court dismissed one false bomb count and one criminal threat count. (CT 43.) After a jury trial, Mr. Martindale was found guilty on both remaining counts. (CT 93; 2RT 915.)

Prior to sentencing, the court ordered Mr. Martindale placed in a diagnostic facility pursuant to section 1203.03. (CT 101; 2RT 1205-1206.) After his return, the court suspended imposition of sentence and placed Mr. Martindale on probation for 5 years with credit for time served. (CT 119; 2RT 1505.)

STATEMENT OF THE FACTS

On July 30, 2007, Mr. Martindale went to the Valley Economic Development Center (VEDC) to discuss his application for a business loan. (2RT 606.) The Pasadena Small Business Administration had referred him to VEDC about getting a micro-loan to help with the operating expenses of his small business. (2RT 623-624.) At VEDC, he met with a loan officer who told him he could not receive a loan because of issues with his credit. (2RT 328, 373, 606.) Mr. Martindale became upset. (RT 328.) The

Pasadena Small Business Association had told him he was entitled to a micro-loan because his small business was certified as a disadvantaged business; he did not understand how he could be rejected by VEDC. (2RT 625-626.)

The director of lending came to speak with him and explained that VEDC could not give him a loan, but he could come back after he worked on issues in his credit report. (2RT 328, 331.) Mr. Martindale remained upset and asked to speak with a supervisor. (2RT 332.) The president of VEDC, Roberto Barragan, came to speak with him and also said that his credit report precluded him from getting a loan. (2RT 333, 355.) Mr. Martindale became increasingly upset and insisted that he was entitled to a loan. (2RT 333-334.) He explained that he had federal government Level II Trust Credentials and tried to show Barragan documents that explained how some of the information in his credit report was false, but Barragan still said he could not have a loan. (2RT 268-629.)

Mr. Martindale testified that Barragan told him, "Your black ass isn't entitled to anything, and you just get your black ass out of my office." (2RT 630.) Barragan said, "You don't have no business, you don't have nothing, you don't got nothing to do with the government," and other profane things. (2RT 630.) As Mr.

Martindale turned to leave, Barragan said "Get your black ass out of here." (2RT 631.) Mr. Martindale was angry; he felt disrespected and discriminated against. (2RT 631.) He told Barragan that he would file complaints with the Federal Trade Commission and other organizations. (2RT 631-632.) Barragan "flipped him off" and said, "Get out of here, you nigger. You are nothing. You are nobody. You will never be nothing," which made Mr. Martindale very angry. (2RT 632, 643.)

Mr. Martindale refused to leave, cursing and yelling at Barragan. (2RT 362.) The two men walked to the doorway of VEDC's office suite, about ten feet away from where receptionist Joann Liddell was sitting. (2RT 363.) Mr. Martindale yelled at Barragan for three or four minutes, calling him a "Nazi," before finally leaving. (2RT 376.) As Mr. Martindale walked toward the elevator doors, he said that when he finished with VEDC, "the parking lot is going to be level." (2RT 363-364, 379.) Liddell heard the statement and took it to mean that Mr. Martindale was threatening to blow up the entire building. (2RT 362, 379.)

Two minutes after he left, Mr. Martindale began calling the VEDC, asking to speak with Barragan. (2RT 365.) Liddell answered the calls, but refused to put them through to Barragan. (2RT 365.) Mr. Martindale was angry and said to Liddell, "Let me

speak to that motherfucker. I want to speak to that Nazi motherfucker," and "Don't call me no nigger either." (2RT 365.) He yelled profanities about Barragan. (2RT 377.) He also said he "was going to blow up the fucking parking lot," and "when he finished, that it would be level." (2RT 367, 380.) Liddell hung up but Mr. Martindale would repeatedly call right back. (2RT 365, 368.) Liddell became afraid listening to the calls because Mr. Martindale had been acting "real crazy," and after about 10 calls she stopped answering the phone. (2RT 339, 367-368.) With no one answering the phone, Mr. Martindale's calls went to voicemail. (2RT 369.) He left three or four voicemail messages, ranting and cursing at Barragan. (2RT 350; CT 58-59.) He left a message that said he was going to "level the parking lot." (2RT 366.)

Mr. Martindale testified that he did not say he was going to blow up the building. (2RT 638.) He never intended to hurt anyone; he only wanted to apply for a micro-loan. (2RT 633.)

ARGUMENT

I. The Evidence Was Insufficient to Show that Mr. Martindale Violated Section 148.1 Because His Statements Did Not Constitute a False Bomb Report Within the Meaning of the Statute and Because No Substantial Evidence Showed that He Intended to Make a False Bomb Report.

A. Summary

Section 148.1 criminalizes false bomb reports. Specifically, the section prohibits reporting that a bomb "has been or will be placed or secreted" in a public place. But the evidence at Mr. Martindale's trial was insufficient in two respects to show that he made a false bomb report within the definition of the statute. First, a statement about "blowing up" a parking lot does not constitute a report that a bomb "has been placed or will be placed or secreted" in a building. Case law and legislative history show that the section was intended to prohibit actual *reports* of false bombs, because reports that a bomb "has been placed or will be placed or secreted" in a building can cause disruption, expense, and drain on public resources. Second, no substantial evidence showed that Mr. Martindale intended his statements to convey a false bomb report. Therefore, the evidence is insufficient to support Count 2.

B. Standards of review

The People must prove that a defendant committed an alleged offense beyond a reasonable doubt. (*In re Winship* (1979) 397 U.S. 307, 362 [99 S.Ct. 2781; 61 L.Ed. 2d 560]; U.S. Const., 14th Amend.; Cal. Const., art. VI, § 13.) On appeal, evidence is sufficient to support a conviction when the whole record, viewed in the light most favorable to the judgment, contains substantial evidence supporting that judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781; 61 L.Ed. 2d 560]; *In re Arcenio V.* (2006) 141 Cal.App.4th 613, 615.) There must be substantial evidence to support each element of a conviction. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1153.) Substantial evidence is "evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt." (*People v. Boyer* (2006) 38 Cal.4th 412, 479; accord *Jackson*, at p. 319.) To be substantial, evidence must be "reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

When the reach or interpretation of a statute is at issue, an appellate court must examine the question independently. (E.g., *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) A court's primary task is to "ascertain the Legislature's intent so as to

effectuate the purpose of the statute." (*Ibid.*) A court will give significance to every word and phrase of a statute "in pursuance of the legislative purpose." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) If the language of the statute is clear and unambiguous, the court will follow its plain meaning. (*Ibid.*; *People v. Canty* (2004) 32 Cal.4th 1266, 1276.) If the intent of the Legislature is genuinely ambiguous, the uncertainty will be resolved in favor of the defendant. (*Canty*, at p. 1277.)

C. Authority on section 148.1

Section 148.1, subdivision (c), punishes "[a]ny person who maliciously informs any other person that a bomb or other explosive has been or will be placed or secreted in any public or private place . . . ." (§ 148.1, subd. (c).) Subdivision (a) of the section punishes the same conduct, without the requirement of maliciousness, when the false bomb report is made to specified persons or entities. (See *People v. Cheaves* (2003) 113 Cal.App.4th 445, 451; § 148.1, subd. (a).) As interpreted by this Court, section 148.1 prohibits the communication of "false information about placement of a bomb to any other person . . . ." (*Cheaves*, at p. 451.) Although a "report" need only be a verbal statement directed at another person, the statute requires a report "that a bomb has been placed or secreted," and it requires "that the person intend to

communicate that a bomb has been placed or secreted knowing that it has not been." (*Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1020-1021.)

The Legislature's intent in enacting section 148.1 is reflected in a related statute, section 422.1, which mandates that anyone convicted of section 148.1 be ordered to pay restitution to any person or entity "for any personnel, equipment, material, or clean up costs, and for any property damage, caused by the violation directly, or stemming from any emergency response to the violation or its aftermath," (§ 422.1, subd. (a)), and also pay restitution for "any costs for actual emergency response, for all costs of that response and for any clean up costs, including any overtime paid to uninvolved personnel made necessary by the allocation of resources to the emergency response and clean up" (§ 422.1, subd. (b)). In enacting section 422.1, the Legislature expressed an intent to hold persons who make a false bomb report "liable to specified entities for property damage and for the reasonable costs in personnel, equipment, and materials incurred *to respond to and clean up after the threat*, as provided." (Sen. Bill No. 1267 (2001-2002 Reg. Sess.), emphasis added.)

D. Mr. Martindale's statements that he would "blow up" and "level" the parking lot did not constitute a report that a bomb "has been placed or will be placed" in a building, and therefore no substantial evidence showed that he violated section 148.1.

Mr. Martindale's statements that he was going to "blow up" and "level" the parking lot did not constitute a false bomb report within the meaning of section 148.1. The plain language of the statute criminalizes statements which "inform[] any other person that a bomb or other explosive has been or will be *placed or secreted* in any public or private place . . . ." (§ 148.1, subd. (c), emphasis added.) No substantial evidence shows that Mr. Martindale said he placed a bomb in the VEDC building, and no substantial evidence shows that he said he was going to place a bomb in the VEDC building. (See RT 376-377.) The evidence showed that Mr. Martindale was angry because he could not get a loan and that he was trying to get the attention of Roberto Barragan. There is simply no substantial evidence that Mr. Martindale informed Joann Liddell or anyone else that he *had placed or would place* a bomb in the VEDC building. His statements did not constitute a false bomb report within the plain meaning of the statute.

This plain-language interpretation comports with the Legislature's clear intent, which was to criminalize bomb threats

as commonly understood: reports that a specific bomb has been or will be placed somewhere – reports which cause the evacuation of buildings, emergency response, disruption, and so forth. Nothing in the statute or legislative history suggests that the legislature intended to criminalize the phrase "blow up." In section 422.1, the Legislature specifically made defendants convicted of § 148.1 liable for costs stemming from responding to a false bomb report. (See § 422.1, subd. (a-b); see also Sen. Bill No. 1267 (2001-2002 Reg. Sess.; *State v. Berberian* (R.I. 1983) 459 A.2d 928, 931 [harm from false bomb reports is "the undesirable effects of the exercise of a macabre sense of humor by those who would make such false reports"].) There is no evidence that the Legislature intended section 148.1 as a quasi-enhancement for defendants who make criminal threats statements containing references to "blowing up" things. The Legislature intended 148.1 to prohibit false bomb reports in the literal sense: false reports that a bomb would be placed or was already placed in a building – reports which cause evacuations, emergency response, etc.

This Court has interpreted the statute consistent with this intent, holding that the statute "describes a particular act – a report that a bomb has been placed or secreted . . . ." (*Levin v. United Air Lines, Inc.*, *supra*, 158 Cal.App.4th at p. 1021; see also

People v. Cheaves, *supra*, 113 Cal.App.4th at p. 451 [statute prohibits "false information about placement of a bomb"].) *Levin* also consistently describes the salient act as a "report." (See *Levin*, at pp. 1020-1023.) In *Levin*, an airport traveler told security personnel there was a bomb in her luggage. (*Id.* at p. 1019.) In *Cheaves*, the defendant told a 911 operator that he had placed a bomb in Los Angeles Times building. (*Cheaves*, at p. 449.) These are the types of threats criminalized by section 148.1. Section 148.1(c) does not criminalize statements about "blowing up" or "leveling" something – not without more. Applying the statute as intended by the legislature and as interpreted by the Court of Appeal, there is no substantial evidence that Mr. Martindale made a false bomb report to Joann Liddell or another person.

E. No substantial evidence supports a finding that Mr. Martindale intended his statements as a false bomb report.

Section 148.1 "requires that the person intend to communicate that a bomb has been placed or secreted knowing that it has not been." (*Levin v. United Air Lines*, *supra*, 158 Cal.App.4th at p. 1021.) But no substantial evidence shows that Mr. Martindale *intended* his statements to falsely communicate that a bomb had been or would be placed in the VEDC building. The evidence shows that Mr. Martindale was venting his anger at

VEDC, specifically Roberto Barragan. The evidence that he was trying to get Barragan's attention, not to falsely report that a bomb would be placed in the building.

In fact, substantial evidence showed that Mr. Martindale did *not* intend his statements to convey a false bomb report. When Liddell told Mr. Martindale that she had called the police, he was clearly surprised, responding, "Are you serious?" (2RT 368, 379-380.) His surprise shows that he did not intend for his statements to be taken as a bomb report; if he had intended his statements as such, he would not have been surprised that Liddell had called the police. A person who intends to communicate that a bomb has been placed or will be placed in a building would no doubt expect for the recipient of the bomb report to call the police.[2]

The evidence is insufficient to support Count 2 if no substantial evidence showed that Mr. Martindale had the intent to make a false bomb report. (See *People v. Wright* (1892) 93 Cal. 564, 566; § 20.) No substantial evidence showed that Mr. Martindale had such an intent.

[2/] In *Levin v. United Air Lines, Inc.*, the plaintiff intended her remark to be taken sarcastically, but nonetheless intended to communicate that a bomb was in her luggage. (See *Levin v. United Air Lines, Inc.*, *supra*, 158 Cal.App.4th at p. 1025.)

F. Conclusion

The evidence was insufficient to support Count 2 for two reasons: because no substantial evidence showed that Mr. Martindale's statements constituted a false bomb report within the meaning of the statute, and because no substantial evidence showed that Mr. Martindale had the intent to make a false bomb report. Therefore, this Court should reverse the conviction on Count 2.

II. The Trial Court's Answer to the First Jury Question Relieved the Prosecution of Its Burden of Proof on Count 2 and Thus Was Prejudicial Constitutional Error.

A. Summary

During deliberations, the jurors sent a question asking if the phrase "blow up" qualified as a "bomb or explosive device." The court answered yes. This answer was wrong and was constitutional error. The court's answer relieved the prosecution of its burden to prove that Mr. Martindale's statements constituted a report "that a bomb or other explosive has been or will be placed or secreted in any public or private place," an element of the crime. The error was clearly prejudicial because the jury's question showed that it was confused about and focusing on the issue, and a later jury question showed that the jury had

accepted the court's erroneous instruction.

B. Standard of review

A jury instruction which relieves the prosecution of its burden to prove an element of the crime beyond a reasonable doubt violates a defendant's constitutional rights to due process and a jury trial. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-511 [115 S.Ct. 2310; 132 L.Ed.2d 444]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-279 [113 S.Ct. 2078; 124 L.Ed.2d 182]; *People v. Flood* (1998) 18 Cal.4th 470, 491; U.S. Const., 5th, 6th & 14th Amends.) A subsequent guilty verdict must be reversed unless the People can show beyond a reasonable doubt that the verdict was "surely unattributable" to the error. (*Sullivan*, at p. 279; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824; 17 L.Ed.2d 705]; *Flood*, at p. 499.) "[I]nstructional errors – whether misdescriptions, omissions, or presumptions – as a general matter fall within the broad category of trial errors subject to *Chapman* review on direct appeal." (*Flood*, at p. 499; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1201 ["Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict"]).

C. The court's instructions on Count 2

On Count 2, the jury was pre-instructed as follows:

> To prove that the defendant is guilty of this crime, the People must prove that:
> 1. The defendant willfully and maliciously informed a person, to wit: Joann Liddell;
> 2. That a bomb or other explosive device has been or will be placed or secreted in any public or private place;
> 3. That the defendant knew this information was false;
> AND
> Someone commits an act willfully when he does it willfully or on purpose.
> Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to defraud, annoy, or injure someone else.

(CT 90; 2RT 667.) After less than two hours of deliberations, the jury sent a note asking in part:

> Does "blow up" qualify as bomb or explosive device[?]

(CT 68.) After conferring with counsel, (CT 98; 2RT 901-902), the court answered the jury's question with the following instruction:

> Yes, if you find the defendant maliciously and willfully conveyed any words or conduct to another person and that person reasonably believed that this was a threat to use a bomb or explosive device, then such words or conduct qualify as a bomb or explosive device to prove element number 2 of the crime alleged in Count 2.

(CT 69; 2RT 902.)

D. The answer to the first jury question unconstitutionally relieved the prosecution of its burden to prove an element of the crime: that Mr. Martindale's statements constituted a report that a bomb had been or would be placed.

The People had the burden of proving that Mr. Martindale falsely reported that a bomb "has been or will be placed or secreted" somewhere. (§ 148.1, subd. (c).) The jury was correctly pre-instructed on this element. (CT 90.) But after deliberations had begun, the jury sent a question asking the court: "Does 'blow up' qualify as [a] bomb or explosive device[?]" (CT 68, 71.) This question indicated two things: first, that the jury believed Mr. Martindale had *made* a statement about "blowing up" the parking lot; and second, that it was having difficulty determining whether the statement about "blowing up" the parking lot *constituted a false bomb report* – a report that "a bomb or other explosive device" has been placed or secreted. In essence, the jury asked the court that if Mr. Martindale said he would "blow up" the parking lot, was element 2 true? The court's answer was direct: Yes. (CT 69; 2RT 902.)

This instruction was erroneous on its face because it relieved the prosecution of its burden of proof on element 2. It was the People's burden to prove not only that Mr. Martindale had *made* certain statements, but also that those statements constituted a

false bomb report. But the court's instruction relieved the prosecution of the latter burden. The instruction told the jury that if Mr. Martindale had used the phrase "blow up," then yes, that statement constituted a "bomb or explosive device" – and thus a false bomb report. The instruction told the jury that if it found Mr. Martindale had maliciously and willfully *conveyed* the words, and the hearer *believed* they were "a threat to use" a bomb, then the element was met – no matter whether the statements actually *constituted* a false bomb report within the meaning of the statute. But this instruction was clearly erroneous; the Court of Appeal has explained that what the hearer *believed* is not legally relevant to whether statements constitute a false bomb report; what matters is whether those statements constituted a communication that a bomb has been or will be placed. (*Levin v. United Air Lines, Inc.*, *supra*, 158 Cal.App.4th at p. 1025 [the "actual effect of those comments on the persons who heard them" has no bearing on this element].)

If the phrase "blow up" qualified as a "bomb or explosive device," then element 2 was necessarily satisfied. But it was the *jury's* task to determine whether, under the circumstances, the statements constituted a false bomb report. Mr. Martindale's jury – perhaps suspecting that a statement about "blowing up" a

parking lot did not in itself constitute a false bomb report – asked the court if Mr. Martindale's statement satisfied element 2. The court instructed the jury that yes, it did. If there was any factual question about whether Mr. Martindale's statements about "blowing up" constituted a false bomb report – and the jury's question indicated that it was struggling with the issue – the court's instruction improperly resolved the question.

The instruction was erroneous on its face because it relieved the prosecution of its burden of proof in violation of the Fifth and Fourteenth Amendments. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275 at pp. 277-279; *People v. Flood*, *supra*, 18 Cal.4th at p. 491.) The error tainted the court's earlier, general instruction on section 148.1 because the erroneous instruction was on a specific point which the jury asked about. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612 [66 S.Ct. 402; 90 L.Ed. 350].) "[I]n a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. (*Ibid.*) Unfortunately, the last word of the trial court – which admitted that it was making up the instruction as it went along, (2RT 699) – relieved the prosecution of its burden of proof. This was clear constitutional error.

E. The constitutional error was not harmless beyond a reasonable doubt because the jury was clearly focused on the issue and accepted the court's misinstruction.

The court's error was clearly prejudicial because it specifically resolved an issue that the jury was focusing on and had inquired about: whether Mr. Martindale's statement about "blowing up" a parking lot constituted a report that a "bomb or explosive device" has been or would be placed or secreted. Requests by a jury are strongly indicative of problems it has in resolving a case and the particular issues it is focusing upon. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [jury's request for clarification of residual doubt instruction "strongly indicate[d]" that jury was focused on defendant's role in murder]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [jury's request for clarification of terms in self-defense instruction suggest that question of self-defense was "critical" for jury]; *United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 809.) The court's error on that very point in response to a jury question clearly contributed to the verdict by allowing – and instructing – the jury that Mr. Martindale's statement constituted a false bomb report. (See *Chapman v. California, supra*, 386 U.S. at p. 24 [beneficiary of constitutional error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict

obtained"].)

The error was not harmless beyond a reasonable doubt because as explained in Part I *supra*, a threat to "blow up" or "level" something, by itself, does *not* constitute a report that a bomb has been or will be placed within the meaning of section 148.1. Therefore, given the evidence, Mr. Martindale's statements could not constitute a false bomb report. But even assuming *arguendo* that they could, it was the jury's duty to decide whether they did, and the court's instruction erroneously resolved the issue. Moreover, the prejudice is clearly demonstrated by the jury's subsequent question regarding Count 2, the wording of which shows that it had internalized the court's erroneous instruction. After the court gave its erroneous answer to the jury's first question, the jury sent out another question about Count 2. (CT 98; RT 903.) The jury's second note read as follows:

> Count 2
> Item 2
> In threat, whose mind must we conseder [sic]:
> A. Joanne Liddell perceiving a real threat or
> B Defendant had actual intent
> Whose mind has priority?

(CT 94.) This question shows that the jury accepted the court's previous answer that yes, the statement "blow up" qualified as a

bomb report, and had moved on to considering the issue of intent. Notably, the jury used the term "threat" even though Count 2 was not the criminal threats charge, it was the false bomb report charge. The jury, by asking about the "threat" in context of Count 2, demonstrated that it believed a "threat" was sufficient to find Mr. Martindale guilty on that count and the only question was one of intent.

Under the circumstances of this case, there is no question that the erroneous instruction contributed to the jury's verdict. The instruction relieved the prosecution of its burden of proof in precisely the way the jury had asked.

F. To the extent that the issue is forfeited by trial counsel's acquiescence in the instruction, counsel provided prejudicially ineffective assistance of counsel.

Mr. Martindale's trial counsel did not object to the court's response to the first jury question. (2RT 902.) To the extent that a challenge to the court's error is forfeited by the failure to object, trial counsel provided constitutionally ineffective assistance. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 15 of the California Constitution entitle a criminal defendant to the effective assistance of counsel at trial. (*Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052; 80 L.Ed.2d 674]; *People v. Pope* (1979) 23 Cal.3d 412.) To

provide effective assistance, counsel must provide representation equivalent to that which would be provided "by a reasonably competent attorney acting as a diligent, conscientious advocate." (*Pope*, at p. 424; see also *Strickland*, at p. 688.) A defendant must show that he was prejudiced by his attorney's error – i.e., he must show a reasonable probability that the result would have been different but for counsel's error. (*Strickland*, at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

Any reasonable attorney, when faced with a proposed jury instruction that relieved the prosecution of its burden of proof and was ambiguous, would have objected. As explained *supra*, the court's answer to the jury question was both clearly deficient and prejudicial. If counsel had objected, it is reasonably probably that the prejudice would have been avoided and Mr. Martindale would have been acquitted on Count 2.

G. Conclusion

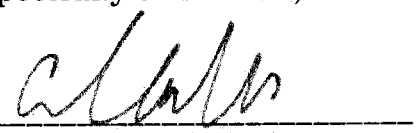
The court' s answer to the first jury question unconstitutionally relieved the prosecution from its burden of proof on element 2 of the false bomb report count. Because the error was not harmless beyond a reasonable doubt, the conviction must be reversed.

CONCLUSION

Because the evidence was insufficient to support Count 2, the conviction on that count must be reversed. Moreover, the conviction on Count 2 must be reversed because the court committed prejudicial instructional error.

Dated: July 27, 2009

Respectfully submitted,



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CERTIFICATION OF WORD COUNT

I certify that the Appellant's Opening Brief contains 4,844 words, as calculated in accordance with rule 8.204(c) of the California Rules of Court. Executed at Pasadena, California, on July 27, 2009.

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